

STATE OF INDIANA)
)**SS:**
 C O U N T Y O F M A R I O N) IN THE MARION COUNTY CIRCUIT COURT
) CAUSE NO. 49C01-0105-MI-001111-A

SALLY B. MCCARTY, as the)
 Insurance Commissioner of the Department)
 of Insurance of the State of Indiana,)
)
 Plaintiff,)
)
 v.)
)
 SUSAN BLAIS, ALAN BLOOM,)
 PATRICIA FITZPATRICK, PATRICIA)
 RICHARDS AND JEFFREY WELCH,)
 officers and/or directors of **MAXICARE**)
 INDIANA, INC. AND **MAXICARE**)
 HEALTH PLANS, INC.,)
)
 Defendants.)

COMPLAINT

Indiana Insurance Commissioner Sally B. McCarty (“Commissioner”) complains of Defendants as follows:

Background

1. Pursuant to IC 27-1-1-2, the **Commissioner** is the duly qualified and acting Insurance Commissioner of the Department of Insurance of the State of Indiana.
2. **Maxicare** Indiana, Inc. (“Maxicare”) is a Health Maintenance Organization (“HMO”) organized and existing pursuant to IC 27-13.
3. As described in IC **27-9-1-1(7)**, Indiana’s Supervision; Rehabilitation; and Liquidation Act applies to all HMO’s under IC 27-13. Pursuant to IC 27-13-25, the rehabilitation of an HMO shall be considered **the** rehabilitation of an insurance company and shall be conducted under IC 27-9,

4. The Commissioner filed on May **4, 2001**, both a Petition for Rehabilitation as against Maxicare, pursuant to IC 27-9-3-1, and a Petition for Seizure Order as against Maxicare, pursuant to IC 27-9-2-2. The Court entered orders granting both the Petition for Rehabilitation and the Petition for Seizure on May **4, 2001**. By terms of the order on the Petition for Rehabilitation, the Commissioner has been appointed and now serves as the Rehabilitator of **Maxicare** ("Rehabilitator"), and has appointed Elizabeth A. Lovette as Special Deputy Rehabilitator.

5. Pursuant to **IC 27-9-3-3(e)**, the Commissioner, as Rehabilitator, may take such action as she considers necessary or appropriate to reform and revitalize the insurer.

6. Pursuant to IC 27-9-3-3(f) she may prosecute any action that exists on behalf of the creditors, members, policyholders, or shareholders of the HMO against any director or officer of the HMO or any other person or entity.

7. A Petition for Liquidation is now on file to be heard June **25, 2001**. If that Petition is granted the Commissioner, as liquidator, has similar authority under IC 27-9-3-9 **(b)(6), (b)(12) and (b)(13)**.

8. According to the most recent annual report of **Maxicare** filed pursuant to IC **27-13-8-1**, et **seq.**, the following are officers and directors of Maxicare:

Susan Blais – President and director
Alan Bloom – Secretary and director
Patricia Fitzpatrick – Treasurer and director
Patricia Richards – director
Jeffrey Welch – director

These directors of an Indiana corporation are subject to jurisdiction of this Indiana court.

9. **Maxicare** Health Plans, Inc., a Delaware corporation ("**MHP**") is a **holding** company that owns various subsidiaries, primarily in the field of managed care, including Maxicare.

10. MHP has, and does, conduct business in and is otherwise amenable to personal jurisdiction in the State of Indiana.

11. Under IC 27-13-16-1, an HMO is required to have a plan for handling receivership that allows for the continuation of benefits **after the date** of receivership for the longer of: (1) the duration of the contract period for which premiums have been paid; or (2) sixty (60) days.

12. Based on information currently available to the Commissioner, **Maxicare** either -does not have a plan in place for handling continuation of benefits or any such plan does not meet the requirements of IC 27-13-16-1, *et seq.*

13. Pursuant to her statutory authority under IC 27-9-1-5 the Commissioner has inquired of an officer and director of **Maxicare** and of the General Counsel of MHP of all acts taken by **Maxicare** and/or MHP to provide for or implement a continuation of benefits plan, If no such plan is in place the Commissioner has asked for an explanation why such a plan is not in place. The Commissioner has not received a response to such inquiry as of the date of this Complaint.

14. The failure of **Maxicare** to have a plan in place for handling continuation of benefits may require the Commissioner to assess each other licensed Indiana HMO, pursuant to IC 27-12-B-1, in amounts sufficient to provide for continuation of benefits as required by IC 27-13-16-1 *et seq.* and for administrative expenses.

15. Most of Maxicare's financial information and records are in the care, custody and control of MHP. The Commissioner's access to Maxicare's own documents has been limited. Although the Commissioner has requested the financial documents and information necessary to ascertain Maxicare's true financial status, including whether the Commissioner has claims as Rehabilitator, not all requested information has been forthcoming from **MHP**.

Count I – Breach of Contract

16. **Maxicare** entered into an Administrative Services Agreement ("Agreement") with MHP. Pursuant to the Agreement, MHP agreed to provide **Maxicare** administrative, consultation and other services including, but not limited to risk management, legal services and governmental relations. A copy of the Agreement provided to the Commissioner is attached as Exhibit "A".

17. The Agreement was designed for MHP to provide administrative services that would enhance Maxicare's organization and administrative capacity. The goals of the Agreement included maintaining the state license of the plan and operating the plan on a sound financial basis.

18. A specific duty of MHP was to provide relevant legal services to Maxicare. MHP agreed to assist and advise **Maxicare** in its efforts to secure and maintain all licenses and permits required in connection with the management and operation of the plan.

19. Among **MHP's** duties was handling Maxicare's compliance with IC 27-13-16-1, et seq. for a continuation of benefits.

20. By failing to provide for a continuation of benefits plan for **Maxicare** pursuant to the provisions of IC 27-13-16-1, **MHP** breached the Agreement with Maxicare.

21. **MHP's** failure to provide a plan for continuation of benefits has caused damage in the amount necessary to continue benefits of Maxicare's members in compliance with the provisions of IC 27-13-16-1.

22. MHP also agreed to administer Maxicare's expenses and costs of operation. The Commissioner believes that income (and premiums paid) to **Maxicare** went to MHP and MHP was to pay Maxicare's expenses. In some cases **MHP** contracted directly for services provided to and on behalf of Maxicare.

23. Although MHP received Maxicare's income to the date of rehabilitation, MHP did not pay certain **Maxicare** expenses.

24. **MHP's** failure to pay these **Maxicare** expenses that it is obligated to pay, amounts to a breach of the Agreement.

Count II – Breach of Implied Contract

25. **MHP** provided administrative services for Maxicare.

26. In the course of their dealing **MHP** was responsible for or assumed the responsibility for Maxicare's compliance with the continuation of benefits requirements of IC 27-13-16-1.

27. MHP, and its agents, handled matters relating to Maxicare's continuation of benefits requirements **with** the Indiana Department of Insurance.

28. **MHP** breached this implied agreement with **Maxicare** by failing to provide for Maxicare's continuation of benefits plan.

29. **MHP** also agreed and the course of dealing of the parties was that **MHP** would administer Maxicare's expenses and costs of operation. The Commissioner believes that income

(and premiums paid) to **Maxicare** went to **MHP** and MHP was to pay Maxicare's expenses. In some cases MHP contracted directly for services provided to and on behalf of Maxicare.

30. Although MHP received Maxicare's income to the date of rehabilitation, MHP did not pay certain **Maxicare** expenses.

31. **MHP's** failure to pay these **Maxicare** expenses that it is obligated to pay, amounts to a breach of their implied agreement.

Count III – Fraudulent Concealment

32. MHP represented to the Indiana Department of Insurance that a continuation of benefits plan was in place.

33. MHP had a duty to disclose to the Indiana Department of Insurance any change in the status of the continuation of benefits plan.

34. MHP never disclosed to the Indiana Department of Insurance that the continuation of benefits plan was changed to be out of statutory compliance and/or eliminated.

Count IV – Alter Ego

35. **MHP** controlled and dominated Maxicare, such that **Maxicare** was a mere instrumentality of MHP.

36. MHP handled, controlled and directed Maxicare's administrative services and finances.

37. Certain officers and directors of **Maxicare** are also officers and/or directors of MHP.

38. The control and manipulation of **Maxicare** by MHP has resulted in Maxicare's failure to have a continuation of benefits plan, as required by Indiana law.

39. MHP, by controlling and manipulating Maxicare, has made false, misleading and/or inaccurate representations to the Indiana Department of Insurance and has failed to disclose material information to the Indiana Department of Insurance regarding Maxicare's compliance with Indiana statutory requirements.

40. As the entity in control of Maxicare, MHP has accepted and held **Maxicare** income but has not paid certain of Maxicare's expenses, debts and obligations.

41. **MHP** equitably should not be allowed to stand behind a corporate veil. Its conduct in controlling, managing and manipulating **Maxicare** has resulted in Maxicare's failure to have a continuation of benefits plan and that certain of Maxicare's debts and expenses remain unpaid.

Count V – Liability of Maxicare's Officers and Directors

42. Each and every director and officer of **Maxicare** owed a fiduciary duty to Maxicare.

43. The directors and officers of **Maxicare** breached their fiduciary duty by failing to have a continuation of benefits plan in place.

44. The officers and directors breached their duty when they knew or should have known of Maxicare's insolvency or imminent insolvency yet they placed the interests of MHP over those of Maxicare's members and creditors.

45. The directors and officers breach of their fiduciary duties, including acting in a knowing and/or reckless manner, have caused damage in the amount necessary to pay for the required continuation of benefits plan, the Commissioner's additional administrative expenses, the unpaid and outstanding debts of **Maxicare** and such other damages as the Commissioner may become aware as Maxicare's documents are disclosed.

Count VI - Preferences and Accounting

46. MHP handled, controlled and directed Maxicare's administrative services and finances.

47. The Commissioner believes that MHI? received Maxicare's income to the date of rehabilitation, although the Commissioner's access to Maxicare's own documents has been limited.

48. In its ORDER FOR INJUNCTIVE AND OTHER RELIEF of May **22, 2001** the Court ordered Maxicare's affiliates to, among other things, not transfer, waste or dispose of any of the property or assets of Maxicare.

49. **MHP** may have treated such income from **Maxicare** as payment for administrative services, or allocation of costs under agreements for pharmaceuticals or other products. Such treatment may constitute a preference under IC 27-9-3-16 *et.seq.*

50. The Commissioner seeks an accounting of all transactions between **Maxicare** and **MHP** in order to ascertain, among other things, how the finances of **Maxicare** were handled, the extent to which **MHP** holds assets of Maxicare, the nature of any obligations incurred by **Maxicare** in favor of **MHP**, and whether or to what extent such payments or transfers of property, or obligations incurred are subject to avoidance and recovery for the benefit of **Maxicare** and its estate.

WHEREFORE, the Commissioner, by counsel, prays for judgment in an amount sufficient to pay for the statutorily required continuation of benefits plan, additional administrative expenses caused by Defendants' failure to have the statutorily required plan, the unpaid and outstanding debts of **Maxicare** and such other damages as the Commissioner may

become aware as Maxicare's documents are disclosed, for a financial accounting and for all costs of this action and all other proper relief.

Respectfully submitted,

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*Attorneys for Plaintiff, Sally B. McCarty
(as the Insurance Commissioner of the Department
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